

Novartis Hit With Retaliation Suit Over Kickback Scheme

By **Bill Wichert**

Law360 (October 21, 2019, 2:47 PM EDT) -- A former Novartis Pharmaceuticals Corp. employee on Monday launched a revised suit in New Jersey federal court alleging he was fired for objecting to a purported kickback scheme in which the company provided commercial discounts on multiple sclerosis drug Gilenya to Express Scripts Inc. in exchange for Medicare Part D business.

Eight months after U.S. District Judge Kevin McNulty **nixed** Joseph Perri's initial False Claims Act suit against the two companies, which included a retaliation claim against Novartis, Perri sued the pharmaceutical giant alone after U.S. Magistrate Judge James B. Clark III on Friday granted the man's bid to file the amended complaint.

By including allegations in the new suit regarding a conversation with his supervisor, "Perri has attempted to remedy the deficiencies" Judge McNulty outlined in dismissing the retaliation claim, Judge Clark said in his written opinion.

Judge McNulty had said in his Feb. 21 opinion that the initial complaint — which Perri brought on behalf of the U.S. government — "does not make clear what relator said, whether it was said to anyone at Novartis and if so to whom, and whether the conversation notified the employer of any actual fraud under the FCA."

"The only conversation concretely described is one with an ESI representative, which relator vaguely alleges must have gotten back to his supervisors," Judge McNulty said.

In Friday's opinion, Judge Clark said the newly detailed alleged conversation with Perri's supervisor "at the very least, clarifies 'what relator said, [and] whether it was said to anyone at Novartis and if so to whom.'"

"The question of whether the alleged conversation notified Novartis of any actual fraud under the FCA, which Novartis contends it did not, is less clear," Judge Clark added.

"Although Novartis may prove correct in its assertion that the amended complaint fails to cure the deficiencies previously outlined by the court and therefore fails to state a retaliation claim, it appears to the court that a ruling on Novartis' arguments in this respect would require legal determinations better suited for a motion to dismiss," the judge said.

The amended complaint asserts a claim under the anti-retaliation provision of the FCA.

Perri was Novartis' account director for Express Scripts at the time of the allegedly illicit arrangement, according to court documents. As a pharmacy benefit manager, Express Scripts sponsors commercial, Medicare Part D, and Medicaid health plans, court documents state.

Such companies administer prescription drug benefits; develop formularies, which list drugs covered under a health plan; and negotiate with drug manufacturers, which provide discounts and rebates to secure a spot for their drugs on a formulary, court documents state.

Perri alleged in the amended complaint that Novartis directed him "to carry out the company's practice of swapping commercial rebates and other incentives in return for" Medicare Part D business. The unlawful swap occurred amid "competitive pressure" from Biogen MA's multiple sclerosis drug Tecfidera, according to the complaint.

"Novartis provided higher/competitive commercial savings and no additional Part D savings in return for maintaining Gilenya's position on ESI's commercial and Part D formularies," the complaint said. "ESI's commercial plans received a 10% rebate rate, while ESI's Part D plans received the minimal 6.375% rebate rate."

Perri's supervisor, Greg Birch, the vice president of managed care at Novartis, later instructed him to keep the Part D rebate rate at 6.375% and increase the commercial rebate rate to the 12% to 14% range, the complaint said.

Perri said he requested a meeting with Birch, which occurred around the end of the first fiscal quarter of 2014. At the meeting, Perri said he "conveyed his concerns to Birch, and explained how increasing the disparity between the commercial and Part D rebate rates would expose the swap, subjecting Perri and Novartis to government prosecution."

"Perri went as far as to say that he 'did not want to go to jail,'" the complaint said. "Birch's response was, 'f**k the government.'"

Birch continued to reject Perri's proposal to increase the commercial and Part D rebate rates to 14% each, the complaint said.

After Perri ultimately shared his concerns with his counterpart at Express Scripts, the company sought an equal Part D rebate rate, the complaint said. Perri's conversation with the Express Scripts representative was relayed to management at Novartis in June 2014, the complaint said.

Birch told Perri to schedule a meeting with Express Scripts for June 18, 2014, to discuss the Gilenya rebates, the complaint said. Birch also directed Perri to meet him at the Novartis headquarters the day before to prepare him and Mark Smith, Novartis' head of national accounts, according to the complaint.

"The June 17, 2014 meeting was an ambush," the complaint said. "Rather than prepare for the next day's meeting with ESI, Birch and Smith terminated Perri."

Novartis offered Perri a package that included "severance pay and other benefits in return for Perri releasing his whistleblower rights/claims under the FCA," the complaint said. Perri said he initially accepted the deal but later revoked it.

"Rather than correcting the fraud, Novartis terminated Perri and tried to silence him with money," the complaint said.

Perri's attorney, Jeremy E. Abay of Sacks Weston Diamond LLC, told Law360 on Monday, "The retaliation claim is ready for discovery. There's no reason to further stall litigation at the pleadings stage."

Counsel for Novartis could not immediately be reached for comment Monday.

Perri is represented by Jeremy E. Abay and John K. Weston of Sacks Weston Diamond LLC.

Novartis is represented by Philip S. May, Matthew J. O'Connor, Michael M. Maya and Patrick M. Phelan of Covington & Burling LLP.

The case is United States of America ex rel. Joseph Perri v. Novartis Pharmaceuticals Corp. et al., case number 2:15-cv-06547, in the U.S. District Court for the District of New Jersey.

--Editing by Daniel King.